pleadings, the action should be allowed, *Malloney* v. *Horan* (1872) 49 N. Y. 111, the holding of the Massachusetts court would seem to be more in accord with these underlying ideas than the older rule and to be preferred even though the court has nothing more tangible to offer than the declaration that "the substantial identity of two causes of action differently expressed is deemed within the direct knowledge of the court from the circumstances of the case, without need of canons of distinction." Canons of distinction are surely desirable, though it may be they cannot be phrased. See 1 COLUMBIA LAW REVIEW 133.

NON-LIABILITY OF A NATIONAL BANK AS PARTNER.—Ordinarily the legal owner of stock in a joint stock company is liable as partner in the absence of an exempting statute. Does a national bank which has received stock as collateral and bought it in to protect itself from loss assume such or any liability? An unexpected answer to this question has been given by the Ohio Supreme Court in *Merchants' National Bank* v. *Wehrmann* (1903) 68 N. E. 1004. It was there held that so far as the purchase of the stock involved the assumption of partnership liability it was ultra vires and imposed no such liability; but that the bank became joint owner of the real property of the joint stock company by virtue of its ownership of the shares, and that having taken part in the management of the property through its agents it was liable for a share of the expenses subsequently incurred by the company, proportionate to the amount of stock it held, in this case nine-fortieths of the whole. The court holds, then, that while the bank has no power to assume unlimited liability it has power to assume nine-fortieths of such liability.

The conclusion reached that a bank has no power under any circumstances to enter into a partnership seems sound. To allow the exercise of such power might involve a bank hopelessly and would be contrary to the holding that a bank cannot enter into general business. *Cameron* v. *Bank of Decatur* (Tex. 1896) 34 S. W. 178; *Cockrill* v. *Abeles* (C. C. A. 8th Circ., 1898) 86 Fed. 505. If a bank has no power to assume the liability of a partner, it would seem to follow that it cannot acquire a partner's rights. The purchase of a share represents the entry into a contract between the vendee and the other stockholders involving certain rights and liabilities. If it is beyond the power of the corporation to assume the liabilities of the contract of partnership, it follows that it has no power to enter into the contract at all. The court cannot make a new contract for the parties and say that the corporation acquired the rights but did not assume the obligations incident to becoming a member of a joint stock-company. In *California Bank* v. *Kennedy* (1896) 167 U. S. 362 it was held that where a national bank acquired stock in another bank which by the law of California made the former liable for its proportion of the debts of the latter, the former could not be held as it had no power

to acquire the stock under the statutes of the United States. The court says that the corporation had no power to purchase, and therefore no liability could be imposed by virtue of the attempted purchase of the stock. Ultra vires contracts cannot form the basis of an action according to the well settled doctrine in the United States Supreme Court. Taylor on Corporations, 5th ed. §264a.

The court in the principal case reaches its result by holding that independent of the contractual rights it purported to confer, the transfer of the shares operated to transfer title to the real estate held by the company, that the title to the real property having vested in the bank it could be held liable for its share of the expenses of its management. *Cockrill* v. *Abeles*, supra. But clearly the bank got no legal title to the real estate through the mere transfer of the stock and there is no mention of any deed. Further it would seem that the equitable interest that each shareholder had in the realty was merely by virtue of his rights as partner and the bank not becoming a partner obtained no such interest. *Riddle* v. *Whitehall* (1889) 135 U. S. 621 at 634 et seq. *City of Natchez* v. *Minor* (1848) 17 Miss. 544. It would follow then that no interest in the real estate passed to the bank on which to found the liability of a joint owner and that as the interest of the pledgor in the joint stock company did not pass to the bank by its ultra vires contract it was under no liability as partner. In this event the bank is fully protected by its right as pledgee to hold, collect the income and sell; creditors still have the liability of the pledgor to rely on, and, as has been decided, have notice of the bank's rights, and the bank has not any of the onerous burdens which the ownership of the stock would carry with it. See *Robinson* v. *Southern National Bank* (1900) 180 U. S. 295.

ELECTION AS AGAINST AGENT AND UNDISCLOSED PRINCIPAL.—Whether a judgment secured by a third person against the agent of an undisclosed principal will be a bar to a subsequent action against the principal, is a question raised by a case in the United States Circuit Court of Appeals, for the Seventh Circuit. *Barrell* v. *Newby*. (C. C. A. 7th Circ., 1904). This is a point on which the authorities differ. Some hold with the principal case that a judgment against the agent concludes the matter, *Priestly* v. *Fernie* (1865) 3 H. & C. 977, while others hold that satisfaction alone will be a bar to a subsequent action. *Beymer* v. *Bonsall* (1875) 79 Penn. St. 298; *Brown* v. *Reiman* (1900) 48 App. Div. 295. It is commonly stated that the third party may hold either the principal or the agent at his election, and what constitutes an election is usually a question of fact to be determined by the jury. Mechem on Agency, § 696. Accordingly it has been held, that filing an affidavit of proof against the estate of the insolvent agent, *Curtis* v. *Williamson* (1874) L. R. 10 Q. B. 57, or even commencing suit against the agent, *Cobb* v. *Knapp* (1877) 71 N. Y. 348, is not such conclusive evidence of an election as to preclude a subsequent suit against the principal, as